

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 12, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2289-CR

Cir. Ct. No. 2013CM303

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRELL G. LEWIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Adams County:
CHARLES A. POLLEX, Judge. *Affirmed.*

¶1 BLANCHARD, P.J.¹ Darrell Lewis appeals a judgment of conviction for one count of possession of THC. He argues that the circuit court

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

erred when it denied his motion to suppress evidence underlying this marijuana charge, which police discovered during a warrantless, unconsented search of his SUV, on the ground that the search was illegal under *Arizona v. Gant*, 556 U.S. 332 (2009). For the reasons explained below, I conclude that the search of Lewis's SUV incident to his arrest for operating while intoxicated (OWI) was in conformance with *Gant* and Wisconsin case law interpreting that case. Accordingly, I affirm.

BACKGROUND

¶2 The following facts are undisputed and taken from the testimony of one of the officers, who testified at the suppression hearing.

¶3 At approximately 8:30 a.m. on June 28, 2013, a woman reported to police that a man later identified as Lewis had “just left” her residence, driving an SUV while intoxicated. She described the SUV in detail. The woman indicated that Lewis was en route to a residence whose location she identified. Police officers were dispatched to this location.

¶4 At approximately 8:40 a.m., upon arriving at the location indicated by the caller, one officer saw the identified SUV and pulled up behind it in the residence driveway. Lewis got out of the SUV as the officer parked behind it and began walking toward the residence, at which point the officer asked Lewis to come back and talk to him. Lewis complied with this request. As Lewis walked back toward the officer, the officer observed that Lewis's “balance wasn't steady” and that he was swaying as he walked. Lewis told the officer he had just come from a grocery store, and indicated that the officer could look in Lewis's SUV to

verify this account.² When the officer looked in the SUV, he observed a bag of groceries. The officer also observed that the SUV's passenger side window was down, and that there were two mostly empty, "smaller" vodka bottles on the ground outside of the SUV by the passenger side window, within five to ten feet of the SUV. The officer also determined that the SUV's engine compartment was warm to the touch, suggesting recent engine use.

¶5 While speaking with Lewis, the officer smelled an odor of intoxicants emanating from Lewis and observed that Lewis's eyes were bloodshot and glassy. The officer asked Lewis if he had "had anything to drink since he's been back" at the residence, and Lewis replied no. Lewis was subsequently arrested for OWI.

¶6 After the arrest, two officers searched Lewis's SUV. In the center console, the officers found items that included a baggy containing marijuana. The circuit court denied Lewis's motion to suppress this marijuana. Lewis was convicted on the marijuana charge following a no contest plea, and he now appeals.

DISCUSSION

¶7 Lewis acknowledges the rule stated in *Gant* that a warrantless, unconsented vehicle search may be conducted incident to an arrest of a recent occupant of the vehicle so long as it is reasonable for police to believe that evidence relevant to the crime for which the person was arrested might be found in

² The State does not argue that this constituted consent justifying the challenged search. I assume that the challenged search was without consent.

the vehicle. However, he argues that this rule is inapplicable here, because at the time of the search police already had sufficient evidence to arrest Lewis for OWI.³ I conclude that Lewis’s argument is premised on a misinterpretation of *Gant*, and that the State carried its burden of showing that the officers conducted a lawful search of the SUV. Accordingly, I affirm the circuit court.

¶8 Lewis raises only a legal issue in connection with the pertinent constitutional principles, which presents a legal question reviewed de novo. *See State v. Vorburger*, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829.

¶9 In *Gant*, the United States Supreme Court explained circumstances under which it does not violate the Fourth Amendment for police to conduct a warrantless search of a vehicle incident to the lawful arrest of a recent occupant of the vehicle. *Gant*, 556 U.S. at 343-44. One such ground is where “it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’” *Id.* at 343 (quoted source omitted). As the court explained,

[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. But in others, ... the offense of arrest will supply a basis for searching the passenger compartment of an arrestee’s vehicle and any containers therein.

Id. at 343-44 (citations omitted).

¶10 Lewis argues that this rule does not apply here, because the officers “had established enough probable cause to arrest Mr. Lewis for operating while

³ Lewis makes a separate argument for suppression to be reached in the event that I conclude that the search was not lawful under *Gant*, but because I conclude that *Gant* applies I need not and do not address the separate argument.

intoxicated *prior* to searching the vehicle.” (Emphasis in brief.) Lewis contends that, “[s]ince [he] was placed under arrest for suspicion for operating while intoxicated, and that alone was the reason for the arrest, officers did not have the need or the lawful authority to search the vehicle any further pursuant to *Gant*.”

¶11 This argument is without merit. *Gant* does not contain or suggest the limiting principle argued by Lewis, and it would be strange if it did, based on the rationale of *Gant*. Furthermore, his argument has been rejected by this court. See *State v. Smiter*, 2011 WI App 15, ¶16, 331 Wis. 2d 431, 793 N.W.2d 920 (*Gant* “expressly permits searches for evidence relevant to the crime of arrest and does not require police to stop that search once *some* evidence is found.”).

¶12 Lewis attempts to distinguish *Smiter* on the ground that *Smiter* involved an arrest for marijuana possession followed by a search that revealed cocaine, whereas this case involved an arrest for OWI followed by a search that revealed marijuana, which “creates a crucial difference in the analysis of these vehicle searches.” According to Lewis, because sentencing exposure increases “incrementally if additional controlled substances are found,” it is reasonable for officers to search a vehicle for additional drugs incident to a drug-related arrest. In contrast, Lewis argues, here “[t]here [was] nothing that could be found in Mr. Lewis’s vehicle that would increase the penalties he could face for the offense of arrest, operating while intoxicated.”

¶13 This argument is based on a misinterpretation of *Smiter*. The court in *Smiter* did not conclude that the search was lawful because police could have obtained evidence that might have increased the penalty. Rather, the court determined that the officers’ search was lawful under *Gant* because it was

reasonable for the officers to believe that they would find evidence relevant to the crime of arrest. *Id.*, ¶¶16-18.

¶14 Here, the undisputed evidence, summarized above, overwhelmingly supports the conclusion that it was reasonable for the officers to believe that they would find evidence in the SUV related to the OWI charge on which Lewis was arrested. A reasonable inference to be drawn from the open passenger-side window and the location of the bottles outside the SUV, together with other evidence, is that an intoxicated Lewis had very recently tossed or dropped the bottles out of the SUV while parked in the driveway, after purchasing alcohol and driving to this location from the grocery store, linking the interior of the SUV to potential evidence of recent drinking and vehicle operation while intoxicated.

CONCLUSION

¶15 For the forgoing reasons, I affirm the decision of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

